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IN THE SUPREME COURT

OF THE UNITED STATES

No. 73-1616

ROGER M. MADDEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Citations to Opinions Below-------	1
Jurisdiction----------	2
Question Presented----------	2
Statute Involved----------	2
Statement of Case----------	3
Reasons for Granting the Writ-----	6
Conclusion----------	7
Appendix A (The Ninth Circuit Decision)----------	A1

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Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in the above entitled case which affirmed the judgment of the District Court denying defendant's motion to dismiss the information.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is printed in Appendix A.

JURISDICTION

Judgment in this matter was entered by the Court of Appeals for the Ninth Circuit on March 27, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Did the Court of Appeals for the Ninth Circuit err in affirming the District Court's denial of defendant's motion to dismiss the information on the ground that Title 26, Section 7203, United States Code, is unconstitutional on its face and as applied under the Fifth and Thirteenth Amendments to the Constitution?

STATUTE INVOLVED

Title 26, Section 7203, United States Code, reads as follows:

> "Any person required under this title to pay any estimated tax, or taxes, or required by this title or by regulations made under authority thereof, to make a return, (other than a return required under the authority of Section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or taxes, make such return, keep such records, or supply such information, at the time or times required

by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor, and upon conviction thereof, shall be fined not more than $10,000.00, or imprisoned not more than one year, or both, together with the costs of prosecution."

STATEMENT OF CASE

The fact situation in the instant case arises from an award by the Bonneville Power Administration of three contracts to Pacific Fabircators as follows:

Contract No. 14-03-71457, Awarded February 6, 1967

Contract No. 14-03-79779, Awarded October 11, 1968

Contract No. 14-03-0030NB, Awarded August 12, 1969

Pacific Fabricators from time to time had entered into financing arrangements with Caldwell Finance Company. Part of its agreement with Caldwell Finance included an assignment of accounts receivable. This assignment was originally evidenced by a stamp that did not satisfy the requirements of the Assignments of Claims Act (31 U.S.C. Sec. 203, 41 U.S.C. Sec. 15). However, for a time, BPA did make payments on invoices so stamped.

At the pre-award survey, dated September 30, 1968, the report prepared by

E. S. Wold stated in part:

> "Pacific Fabricators' contracts are being financed through Caldwell Finance Co., 811 S. E. Stark Street, Portland, Oregon. They advise us that Pacific Fabricators is okay and they will finance them up to $200,000.00."

This report fairly represented Pacific Fabricators' understanding of the obligation of Caldwell Finance.

The BPA's payment procedure was foreign to Caldwell Finance's business experience, and caused it to be reluctant to honor its financing obligation to Pacific Fabricators. BPA and Pacific Fabricators had a series of disputes regarding payment (amount and time). The net effect was that Caldwell Finance refused to continue its financing commitment.

This situation left Pacific Fabricators and its president, Roger M. Madden, in the dilemma of establishing a priority of payment with funds at its disposal. The judgment of Roger M. Madden was to complete the BPA contract and hold off filing the employer's quarterly federal tax return (Form 941). Roger M. Madden knew that he could file the return without funds, but believed that this would trigger government action that would curtail, if not prevent, the completion of the BPA contract.

At that time, Roger M. Madden was under the impression (perhaps unjustified) that BPA's penalties for

failure to perform would greatly outweigh the late filing penalties in connection with the employer's federal quarterly tax return. Subsequent business reversals weakened, rather than improved the position of Pacific Fabricators, and the organization simply disintegrated.

Roger M. Madden was aware of and accepted the fact that it was his responsiblity to see that the employer's federal quarterly tax returns (Form 941) were submitted to the Internal Revenue Service. Roger M. Madden, since terminating his business operations, has personal liability for a multitude of corporate obligations, and has voluntarily repaid $5,000.00 toward Pacific Fabricator's federal tax return (Form 941) obligation, in addition to sums withheld from his personal income tax returns by the Internal Revenue Service.

Roger M. Madden admits that with respect to the statute under which he is charged, that he knowingly and willfully committed each and every element of the crime, and it is with this knowledge that he entered his guilty plea. However, the defendant specifically reserved the right to appeal to the Ninth Circuit Court of Appeals the question of the District Court's denial of his motion to dismiss the information on the grounds that Title 26, Section 7203, is unconstitutional on its face and as applied under the Fifth and Thirteenth Amendments to the Constitution. Federal jurisdiction lay with the District Court in the first instance since the matter arose under federal statute.

REASONS FOR GRANTING WRIT

A search of the relevant case law reveals no cases directly on this point. The case at bar should be carefully distinguished from those cases upholding the constitutionality of the Internal Revenue Code as it requires individuals or corporations to file their own tax returns. This statute is unconstitutional for the reason that it requires an employer to file an employer's quarterly federal tax return (Form 941), and thereby imposes involuntary servitude upon the employer, thus forcing him to become a bookeeper and tax collector for the employees he hires and the Internal Revenue Service, thereby depriving him of property and liberty without due process of law and thereby violating the Fifth and Thirteenth Amendments to the U. S. Constitution. The Constitution provides in Article I, Section 8, Clause 1, that:

> "The Congress shall have the power to lay and collect taxes, duties, imposts and excises..."

The penalty provided by 26 USCA 7203, as applied to this case, is not one for taxes that are owed and not paid, but is one imposed merely because an act was not performed. The Constitution does not grant the Congress the power to impose such duties upon an employer. In this case, Title 26, Section 7203, United States Code, requires the employer to perform an act that is not required by Article I, Section 8, Clause 1 of the Constitution,

thereby depriving him of property and liberty without due process of law, and forcing him to engage in involuntary servitude.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted and the judgments of the Court of Appeals and the District Court reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
ROGER M. MADDEN,
Defendant-Appellant.

No. 73-3216

MEMORANDUM

(March 27, 1974)

Appeal from the United States District Court
for the District of Oregon

Before: HAMLEY, MERRILL and SNEED,
Circuit Judges

Rober M. Madden pleaded guilty to count five of a thirteen-count Information charging wilful and knowing failure to file with the District Director of Internal Revenue employers' quarterly federal tax returns of federal income taxes withheld frcm wages and Federal Insurance Contribution Act taxes in specified sums in violation of 26 U.S.C., Section 7203. The remaining twelve counts of the Information were thereupon dismissed on motion of the Government. Madden was sentenced to imprisonment for one year on condition that he be confined in a jail type institution for thirty days, the execution of the remainder of the sentence being suspended and Madden being placed on

probation for three years. Madden then took this appeal.

Madden had originally pleaded not guilty and had moved to dismiss the Information on the ground that 26 U.S.C. Section 7203 is unconstitutional on its face and as applied under the Fifth and Thirteenth Amendments of the Constitution. The motion was denied, whereupon Madden changed his plea to guilty on count five. He did so, however, on the assurance of his counsel and the United States Attorney that, despite a plea of guilty, he could appeal for the purpose of challenging the constitutionality of 26 U.S.C., Section 7203.

In view of the assurances given to Madden at the time he pleaded guilty we pass the question of whether one who has pleaded guilty may nevertheless appeal on the ground that the statute in question is unconstitutional. Madden asserts that 26 U.S.C., Section 7203 unconstitutionally imposes involuntary servitude upon an employer by requiring him to file an employer's quarterly federal tax return (Form 941) and thereby forcing him to become a bookkeeper and tax collector for his employees and the Internal Revenue Service. Madden cites no authority for this proposition.

Madden's constitutional attack is really leveled against 26 U.S.C., Sections 3102, 3402 and 6051, rather than 26 U.S.C. Section 7203. The latter statute does not impose any bookkeeping

or tax collecting functions on anyone. It is a penalty provision. The bookkeeping and tax collecting functions Madden is concerned with are prescribed by 26 U.S.C., Sections 3102, 3402 and 6051.

While there appears to be no court decision dealing precisely with the constitutionality of these statutes, there are several Supreme Court and Court of Appeals decisions dealing with similar statutes which, by analogy, require rejection of Madden's contention. See Helvering v. Davis, 301 U.S. 619 (1937); Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Brushaber v. Union Pacific Railroad Company, 240 U.S. 1 (1915); Porth v. Brodrick, 214 F.2d 925 (10th Cir. 1954); Abney v. Campbell 206 F.2d 836 (5th Cir. 1953).

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1616

ROGER M. MADDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On September 10, 1973, petitioner entered a plea of guilty to the fifth count of a 13-count information charging him with failing to file certain employers' quarterly federal tax returns, in violation of Section 7203 of the Internal Revenue Code of 1954, 26 U.S.C. 7203. The court of appeals affirmed (Pet. App.).[1] The judgment of the court below was entered on March 27, 1974 (Pet. App. A-1). The petition for a writ of certiorari was not filed until April 29, 1974, and was therefore untimely under Rule 22(2) of the Rules of this Court. There is, in any event, no reason to grant the writ.

Petitioner's sole contention is that the criminal statute under which he was charged and convicted (26 U.S.C. 7203)

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[1]The court of appeals did not consider the effect of petitioner's guilty plea on his right of appeal, since he had been assured by the United States Attorney that, despite his plea, he could appeal for the purpose of challenging the constitutionality of the statutes under which he was convicted (Pet. App. A-2).

is unconstitutional as applied to him in that it deprives him of liberty and property and imposes involuntary servitude upon him in violation of the Fifth and Thirteenth Amendments, because it requires him to become a bookkeeper and tax collector in violation of those provisions. The argument, for which petitioner cites no authority, is wholly without merit.[2] As the court of appeals held, although the provisions that petitioner challenges have not been the subject of constitutional attack, "decisions dealing with similar statutes, * * * by analogy, require rejection of [petitioner's] contention" (Pet. App. A-3).

Over 50 years ago, this Court upheld the constitutionality of the Revenue Act of 1913 (imposing an income tax) against the challenge that the provisions making it the duty of corporations to retain and pay the tax on interest due on bonds, because of the cost to which corporations were subjected, was repugnant to due process of law as an illegal taking of corporate property. *Brushaber* v. *Union Pacific R.R.*, 240 U.S. 1, 21-26. See, also, *California Bankers Assn.* v. *Shultz*, No. 72-985, decided April 1, 1974, slip op. 22. Similarly, the Acts imposing taxes for old age benefits upon employees and employers have been upheld against constitutional challenge. *Helvering* v. *Davis*, 301 U.S. 619. See *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (constitutionality of Acts imposing unemployment compensation taxes upheld).

The provisions of law requiring employers to withhold and pay over employment taxes to the federal government, contrary to petitioner's contention (Pet. 6-7), do not subject them to involuntary servitude. *Abney* v. *Campbell*, 206 F. 2d 836, 841 (C.A. 5), certiorari denied, 346 U.S. 924; *Porth* v. *Brodrick*, 214 F. 2d 925, 926 (C.A. 10). The power

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[2]As the court below pointed out (Pet. App. A-2), Section 7203 is merely a penalty provision, and petitioner's attack should have been directed at the relevant provisions of the Internal Revenue Code that impose duties upon employers, *viz.*, Sections 3102, 3402, and 6051 of Title 26.

to collect taxes necessarily implies the power to establish the means for collection and payment. Cf. *Kellems* v. *United States*, 97 F. Supp. 681 (D. Conn.).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.

DOJ-1974-08